IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1387 OF 2004

Bhavarlal Ganeshramji Sharma ...Petitioner
Vs.
The State of Maharashtra & Anr. ...Respondents

Shri. Rahul S. Kate for the Petitioner.
Ms M.H.Mhatre for the Respondent-State.
Shri. Sanjaykumar S. Shah for the Complainant.

CORAM : A. S. OKA, J.
DATE : SEPTEMBER 27, 2005.

P.C.:

1. By consent of the parties taken up for hearing. Heard the Advocate appearing for the Petitioner, the learned A.P.P. for the State and Advocate appearing for the Respondent No.2 who is the original Complainant. Apart from the submissions on merits, the learned Counsel appearing for the Petitioner submitted that the Application for discharge made by the Petitioner who is accused No.12 is not considered on merits. The Advocate for the Petitioner placed reliance on judgment of this Court in Criminal Writ Petition No.194 of 2005 (Moharsingh Hansraj Sharma Vs. The State of Maharashtra) delivered on 09th August, 2005. Co-accused in the same case made Application for discharge which was considered alongwith Application made by the present Petitioner and by the impugned order which is common to both the Applications, the said Applications came to be rejected. By order dated 09th August, 2005,

this Court held that the learned Trial Judge has not considered the prayer made by the Petitioner in the Petition for discharge in accordance with law. This Court therefore, observed that instead of keeping the writ petition pending in this Court, with a view to avoid any delay in trial, it is desirable that the application for discharge made by the Applicant should be heard afresh.

2. The learned Advocate appearing for the Respondent No.2 submitted that at the stage of hearing of Application for discharge, the learned Trial Judge cannot take into consideration the matrial and documents on record and only case diary is to be considered. He placed reliance on the decision of the Apex Court reported in (2004) 6 Supreme Court Cases Page 522 (State of Andhra Pradesh Vs. Golconda Linga Swamy and Another), AIR 1990 Supreme Court Page 1962 (Niranjan Singh Karam Singh Punjabi, Advocate Vs. Jitendra Bhimraj Bijja & Others), AIR 1986 Supreme Court Page 2045 (R.S.Nayak Vs.A.R.Antulay & Anr.) and 1996 Criminal Law Journal Page 2448 (State of Maharashtra Vs. Som Nath Thapa) and submitted that the learned Trial Judge has considered the Application for discharge on merits. The learned A.P.P. opposed the Petition. 3. I have considered the

submissions. It will be relevant to refer to the order dated 09th August, 2005 which deals with the same impugned order. In paragraph No.5 of the said order this Court has observed thus:

> 5. I have considered the submissions. A perusal of the impugned order shows that paragraphs 1 to 8 thereof refer to the case of the prosecution and the case of the defence. In paragraph 9 of the impugned order, the learned Judge has referred to the material against the other Accused. In paragraph 10, the learned Judge has referred to the fact that the Accused No.4 and Accused No.15 are absconding. In paragraph 11, the learned Judge has referred to the principles governing the consideration of the discharge under section 227 of the said Code of 1973. In paragraph 12, the learned Judge has referred to the legal position as regards the Application under section 227 of the said Code of 1973. A perusal of paragraphs 13, 14 and the last paragraph i.e. paragraph 15 shows that there is not even a reference to the material

> which is allegedly placed on record against the Applicant by the prosecution. All that the learned Judge has said is that there are statements of 145 persons and a bare perusal of the statements shows some involvement of all the accused. While considering the Application for discharge, the learned Judge was required to consider the broad probabilities of the case and the total effect of material before him. He was required to find out whether or not a prima facie case against the Applicant has been made out. The test to determine a prima facie case would naturally depend on every individual case. On a plain reading of the impugned Judgment and Order, it appears to me that the learned trial Judge has not considered the prayer made by the Applicant for discharge in accordance with law.

In view of what is held by this Court, the order passed by this Court on 09th August, 2005 should normally govern the present Petition.

4. However, I have considered the submissions made by the Advocate appearing for the Respondent No.2. Reliance placed on the decision of the Apex Court in the case of State of Andhra Pradesh (Supra) will not help the Respondent No.2. The Apex Court in the said decision was considering the power of High Court under section 482 of Code of Criminal Procedure Code, 1973 of quashing the proceedings. It will be necessary to refer to paragraph No.7 of the decision of the Apex Court in the case of Niranjan Singh Karam Singh Punjabi(Supra). The relevant part of the paragraph No.7 reads thus:

> From the above discussion, it seems well settled that at the Section 227-228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as gospel truth even if it is opposed to

common sense or the broad probabilities of the case.

5. When Application for discharge is made, the Court is certainly required to evaluate the material and documents on record only with limited object of finding out if facts emerging there from disclose the alleged offence. The court is not required to sift and weigh the evidence at this stage. Nevertheless, the limited evaluation of the material and documents on record is certainly warranted as held by the Apex Court in the case of Niranjan Singh Karam Singh Punjabi (Supra). Perusal of the impugned order shows that there is no consideration of the material and documents on record. Therefore, in my view as done in the other case, the matter deserves to be send back to the Trial Court. Hence, I pass the following order:

: O R D E R :

i) The impugned Judgment and Order dated 07th October, 2003 in so far as it applies to the Petitioner is quashed and set aside and the Application for discharge made by the Petitioner is restored.

ii) The learned Trial Judge will decide the Application for discharge in so far as the present Petitioner is concerned in accordance with the law. The Application shall be considered and decided as expeditiously as possible and preferably within a period of three months from the date of production of an authenticated copy of this order.

iii) It is made clear that all contentions of the parties on merits are expressely kept open.

iv) It is clarified that rest of the order passed by the learned Trial Judge is not disturbed.

v) The parties and the Trial Court to act on an authenticated copy of this order.

JUDGE